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IN THE

Supreme Court of the United States

October Term, 1999

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE HOUSE DEMOCRATIC LEADERSHIP IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE HOUSE DEMOCRATIC LEADERSHIP IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

In cases such as this one[1] where the constitutionality of an Act of Congress has been challenged, and the Executive Branch declines to defend that Act, *INS v. Chadha*, 462 U.S. 919 (1983), this Court has often received briefing by the Speaker and Bipartisan Leadership Group of the House of Representatives, or equivalent entities representing the House.

[1] Consent has been given to the filing of this brief, pursuant to Supreme Court Rule 37.3(a), by counsel for petitioner and respondent. In fulfillment of Supreme Court Rule 37.6, it is noted that (1) none of the counsel for parties authored any part of this brief, and (2) no persons or entities made such monetary contributions as Rule 37.6 specifies for identification herein.

See, e.g., Morrison v. Olson, 487 U.S. 654 (1988); *Burke v. Barnes*, 479 U.S. 361 (1987); *Bowsher v. Synar*, 478 U.S. 714 (1986). Rule II(8) of the Rules of the House of Representatives, provides for legal filings by the Office of General Counsel of the House "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships." Rule II(8) indicates the majority leadership consists of the Majority Leader and the Majority Whip; the minority leadership consists of the Minority Leader and the Minority Whip. The majority and minority leaderships may, or may not, reach agreement on a position to present. In cases where they do not, the leadership group consisting of the leadership of one party may file separately. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1996)(amicus brief by Speaker and majority party leadership group); *American Foreign Service Association v. Garfinkel*, 490 U.S. 153 (1989)(amicus brief by Speaker and majority party leadership group).[2]

The posture of the case as it reaches this Court suggests that the Democratic Leadership ("House minority amicus" or "House Democratic amicus"), should present its views at this time to this Court as an *amicus curiae*.[3] This case presents the issue of whether a statute, 18 U.S.C. section 3501, supersedes *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* established safeguards for custodial interrogations that have

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[2] *See generally* Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemp. Probs. 47 (1998). Minority party positions have been presented through amicus briefs by leading minority figures. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980)(amicus brief by Rep. Hyde (R-Ill.), successfully defending the challenged Hyde Amendment).

[3] Pursuant to House Rule II(8)'s reference to the "minority leadership," the Democratic Leadership consists of the Honorable Richard A. Gephardt, Democratic Leader, and the Honorable David E. Bonior, Democratic Whip.

come to occupy one of the highest places in the firmament of American constitutional traditions. Section 3501 has been the subject of significant debates regarding constitutionality by Congress and the Executive Branch both before and after passage. The importance of those debates makes this one of those cases in which it is appropriate for Congressional amici to present views to this Court.

As for the Democratic Leadership's particular interest in this case, amicus curiae believes its position in cases involving the constitutionality of statutes has been to demonstrate Congressional respect for the Constitution, and to encourage consideration of Congressional enactments in ways that allow this Court to view such enactments as being as much in harmony with the Constitution as possible. Nowhere is that as important as in statutes involving the balance established by the *Miranda* warnings and practices - a balance between effective law enforcement and the constitutional rights of all Americans. There are diverse views on that balance, and the House minority amicus seeks only to present its own views. It is hoped and believed that the Court's deliberations will benefit from the submission of our views on this vital subject.

While the Democratic Leadership's views have developed in the processes of consultation within the House, this Court's schedule in this case makes it appropriate for the Democratic Leadership to file prior to a filing, or an announced final decision about filing, by the majority leadership. If the majority leadership were to file in defense of the constitutionality of Section 3501 as construed by the Fourth Circuit, it might do so at a later date, at the point set for the respondent's brief to be filed, and, after that, this Court might regard the briefing schedule set for this case as making it too late for the minority leadership to submit views. Hence, the Court's established schedule in this case is the cause of the timing of this filing.

ARGUMENT

The United States Court of Appeals for the Fourth Circuit decided in this case that 18 U.S.C. Section 3501 had superseded *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioner will be joined by the United States, and by amici such as state and local law enforcement officials, in urging that the Fourth Circuit erred in underestimating *Miranda*'s constitutional status and this Court's commitment to adhere to its Fifth Amendment jurisprudence. House Democratic amicus also joins in such recognition of the firm support for *Miranda*, especially when the alternative to *Miranda* is recognized, namely, an unfortunate and chaotic situation in which both effective law enforcement, and Americans' confidence in their civil liberties, would suffer.

Furthermore, the House Democratic amicus will provide the Court with a specifically legislative viewpoint regarding the enigmatic Section 3501 enacted in Title II, sec. 701, of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 210 (the "1968 Act" or the "Act"). Specifically, amicus submits that Section 3501 must be viewed in light of elaborate interactions between Congress and the Executive Branch both before and after its enactment. In *Dickerson*, the Executive Branch has not decided to *mount*[4] a challenge to *Miranda*; it has been the active effort of an *amicus curiae*, and the Fourth Circuit considering aspects of

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[4] The term "to mount a challenge" will recur in this brief. It refers to a conscious policy decision by the Executive Branch, or state authorities, to make elaborate and sustained practical efforts to obtain a ruling by the Court that a previous ruling is overruled or regarded as superseded. To "mount a challenge" might include such practical aspects as the following: instructing law enforcement agencies to behave in ways that produce the sought-for challenges; instructing prosecutors to watch for, and to develop, promising cases for a challenge; presenting cases in trial and appellate tribunals in ways that maximize the likelihood of a successful challenge; and seeking, actively and frequently, this Court's consideration of such a challenge.

the matter *sua sponte*, that have made this case what it has become - a challenge in this Court to *Miranda*.

A review of section 3501's background and legislative history reveals that Congress provided little or no basis for expecting the Executive Branch to mount a successful challenge to *Miranda*. Before enactment, the Executive Branch had manifested (with strong support in Congress) its commitment to adherence to *Miranda* practices and to *Miranda*'s application, especially in federal cases. The final form of Title II of the 1968 Act, after a historic debate on the Senate floor, reflects a compromise between two warring factions. That compromise occurred between the faction in Congress much more interested in an election-year symbolic statement about law and order than in mounting an effective challenge to *Miranda*, and the faction opposed to the mounting of such a challenge.

Miranda's strong constitutional basis, and its extraordinary history of acceptance and success in federal law enforcement, receive no serious challenge when neither the legislative nor the executive branches considered it necessary to do so. This approach to the interpretative and constitutional questions seeks to balance effective law enforcement with the constitutional rights of Americans.

I. *Miranda's* Constitutional Basis, and This Court's Decades of Reaffirming *Miranda*, Prevent Congress From Simply Superseding It By a Provision Such As Section 3501.

Miranda itself discusses its constitutional basis, namely, how the *Miranda* warnings and *Miranda* practices safeguard the Fifth Amernment privilege against self-incrimination in the particularly intimidating situation of police custodial interrogation. Accordingly, this Court consistently describes *Miranda* and its corollary principles as having a constitutional basis. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296 (1990)(*Miranda* practices rest on "the Fifth Amendment privilege aginst self-incrimination"); *Moran v. Burbine*, 475

U.S. 412, 427 (1986)(describing *Miranda* as "our interpretation of the Federal Constitution"); *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981)(*Miranda* "determined that the Fifth and Fourteenth Amendments[]" required the famous warnings).

"*Miranda* [sought to] . . . reconcile opposing concerns" of "the need for police questioning as a tool for effective enforcement of criminal laws," and the "substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran v. Burbine*, 475 U.S. at 426-27. This Court has applied the *Miranda* system evenly to federal and state authorities alike, promoting a simple, straightforward, widely-understood and widely-accepted constitutional regimen for the whole nation. This could only be true of a constitutionally-based system, for if *Miranda* represented only an exercise of this Court's nonconstitutional supervisory power over federal cases, *Miranda* could not apply, as it has for over thirty years, in the judicial systems of all fifty states.

Yet, *Miranda*'s great success, in its decades of operation, has been its acceptance by state and local law enforcement authorities that initially considered the decision controversial. Surveys of law enforcement authorities, such as one by an ABA special panel including then-Dade County State's Attorney Janet Reno,[5] have shown that their initial skepticism about *Miranda* has given way to widespread acceptance and appreciation. "There is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow v. Williams*, 57 U.S. 680, 695 (1993); "one seldom hears complaints about *Miranda* from police; these days, *Miranda*-bashing is largely confined to those trying to make political hay." Wayne R. LaFave,

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[5] ABA Special Comm. on Criminal Justice in a Free Society, *Criminal Justice in Crisis* 28 (1988).

Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 856 (1990). Scholarly studies showing that *Miranda* aids the smooth functioning of the criminal justice system while impeding clearance of extremely few criminal cases have refuted contentions to the contrary. *See, e.g.*, Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 Nw. U. L. Rev. 278 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996); George C. Thomas, III, *Plain Talk About the Miranda Empirical Debate: A 'Steady-State' Theory of Confessions*, 43 U.C.L.A. L. Rev. 933 (1996).

The alternative to *Miranda* suggested by a challenge based on section 3501 consists of returning to the pre-*Miranda* system summed up in *Haynes v. Washington*, 373 U.S. 503, 516-517 (1963). In place of *Miranda*'s clear, straightforward, well-understood model of warnings and practices, under that resurrected pre-*Miranda* system the federal courts would evaluate several non-exclusive factors in determining the voluntariness of statements made in custodial interrogations, and *Miranda*-model practices would lose their potency. In addition to the problems with how the pre-*Miranda* system functioned before the 1966 *Miranda* decision, in the year 2000 a return to the pre-*Miranda* system would produce unfortunate chaos. For example, police would not know whether by following *Miranda*-model practices, particularly by warning suspects of their rights, the police would help, or hurt, their efforts. In questioning suspects, police might imagine that by withholding the warnings they increased their chances of obtaining evidence, only to discover that by doing so they had tainted beyond use the statements of suspects who would have answered exactly the same, and provided admissible statements, had they received the warnings. For another example, under the *Miranda* system, suspects must expect that when they give statements to law enforcement agents who adhere to *Miranda*-model practices, those statements will be admitted against them. With a return to the pre-*Miranda* system, defendants might

well consider it much more promising and routine to put their effort into winning the now-murky contests about the voluntariness and admissibility of their statements, burdening the criminal justice system with endless disputes at every level over collateral issues.

II. Congress Provided Little or No Basis in Section 3501 For a Challenge to *Miranda*

Rather than duplicate the submissions of the United States and of other amici in their addressing at length the jurisprudence of *Miranda*, this submission will focus on the legislation at issue in this case, section 3501. Specifically, Congress did not enact section 3501 out of a conviction that the provision would treat a serious problem worth mounting a serious challenge to *Miranda* or that there should or would necessarily be a serious challenge mounted to *Miranda*. Rather, Congress enacted section 3501 largely for symbolic purposes, to make an election-year statement in 1968 about law and order, not to mount a challenge to *Miranda*.

In context, Congress had every reason to expect and to intend what ultimately transpired, namely, that section 3501 has not been used by the Executive Branch to challenge *Miranda* in this Court. As the dissenting opinion in the Fourth Circuit begins, "Thirty years have passed since Congress enacted 18 U.S.C. sec. 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use sec. 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that sec. 3501 must be invoked." 166 F.3d at 695 (Michael, J., dissenting in part and concurring in part). "In fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." *Davis v. United States*, 512 U.S. 452, 463-64 (1994)(Scalia, J., concurring). The pre- and post-enactment context of section 3501 undermines fatally the argument that the provision supersedes

Miranda, particular in a case such as this in which the Executive Branch remains faithful to its practice of over thirty years and does not ask this Court to find *Miranda* statutorily superseded.

A. As the Context of the 1968 Enactment Shows, Congress Had Little Basis for Challenging *Miranda* By a Statute, Such as Section 3501, Applicable Only in Federal Cases

The 1968 Act developed in a legislative process which raises the question of how much, if any, basis for challenging *Miranda* underlies section 3501. A review of the legislative history shows several aspects that force that question. First, the enacting Congress had every reason to see how very likely it was that the Executive Branch would continue to accept *Miranda* even after enactment of section 3501. The legislative history shows section 3501 to be a largely symbolic election-year statement rather than a firm decision to challenge *Miranda*. Second, the context shows just how controversial challenging *Miranda* was, reflecting why Congress could, and did, compromise by enacting section 3501 in a way that did not assure such a challenge. Congress let the Executive Branch decide whether to mount a serious challenge to *Miranda* - and for seven Administrations it has decided against doing so.

During the 1960s, in the lead-up to *Miranda*, this Court's primary concern regarding the voluntariness of custodial interrogations lay with state and local, not federal, interrogations. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964), and cases cited therein. *Miranda* addressed constitutionally dubious "present police practices" about which information "may be found in various police manuals and texts," 384 U.S. at 448, not federal investigative practices or federal manuals.[6] A striking aspect of section 3501 would

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[6] A variety of reasons had led to the federal judiciary focusing thusly on state and local compared with federal custodial interrogations: the

be overlooked unless that federal-state comparison is kept in mind. Namely, Congress wrote section 3501 so that only federal authorities, not state authorities, could invoke it. In context, it becomes clear why, though *Miranda* was controversial on the state level, Congress ultimately enacted only at the federal level: the Congressional enactment was intended to serve largely symbolic purposes, rather than to actually succeed in having this Court declare *Miranda* overruled or superseded.

Moreover, the *Miranda* Court, and the *Miranda* opinion, consciously and visibly made the major point that the *Miranda* warnings and related restrictions reflected previously longstanding, satisfactory FBI self-imposed practices. *Miranda* describes how the Court *sua sponte* asked the Solicitor General for information about FBI practices. *Id.* at 483-86. Using the answers, *Miranda* declares that "the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay." *Id.* at 483. Congressional opponents of a challenge to *Miranda* made the same point. The Senate knew from floor speeches by a Senator who was a former federal prosecutor that the FBI's commitment to *Miranda*-model practices dated back to 1952.[7] At the same time, *Miranda* invited

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diversity of the fifty states and numerous localities compared with the single federal government; the different types of crime investigated by state and federal authorities; the self-imposed, self-restraining practices of the Federal Bureau of Investigation; and, the different capabilities of the federal judiciary to address defendants' rights in cases prosecuted before them compared to state cases appealed to the Supreme Court or collaterally challenged.

[7] The most vigorous voice on the Senate floor during the successful effort to trim back Title II as reported from committee was Senator

equivalently effective alternative practices to protect the constitutional rights it analyzed.

The result was that, as the issue came to Congress, the Court had underlined the acceptability of *Miranda* warnings to the FBI. *Id.* Congress had to factor into any enactment the calculation that whatever quarrel state authorities might have with *Miranda*, since *Miranda* approved the existing federal practices, federal law enforcement authorities would have little or no reason to want or to need to challenge *Miranda*.

B. The Process of Passage, and the Final Form of Title II, Show Congress Expecting No Challenge to *Miranda* Absent a Change in Executive Branch Opposition to Doing So.

In 1967, President Johnson proposed, and the House adopted, a grants program for state law enforcement that served as the vehicle for the 1968 Act. Title II took shape in 1967-68 in the Senate Judiciary Committee initially, and then on the Senate floor. That title was shaped by the Senate Judiciary Committee, chaired by Senator Eastland (D-Miss.). Senator Eastland was a well-known leading voice in the 1960s Senate for addressing Warren Court decisions using the blunt tools of jurisdiction-stripping and attempted legislative overruling of decisions. *See generally* Adam C. Breckenridge, *Congress Against the Court* 39-94 (1970). The initial legislative proposals which became the first draft of Title II of the 1968 Act employed Chairman Eastland's familiar blunt tools against *Miranda*, notably, the tool of cutting off this Court's direct review and the federal courts' collateral review of state cases involving *Miranda*.[8] In other

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Tydings, who often noted his prosecutorial service as a United States Attorney. He quoted repeatedly and at length from statements by J. Edgar Hoover regarding the FBI's commitment to *Miranda*-model practices during the previous two decades. 114 Cong. Rec. 11895 (May 6, 1968); *id.* 14148 (May 21, 1968).

[8] "[E]xercise of jurisdiction by Federal courts is disruptive and tends to dilute the State's enforcement of its criminal laws. To counteract this

words, Senator Eastland initially moved legislation that would have put the issue of challenging *Miranda* beyond the discretion of federal law enforcement authorities, by granting state authorities a powerful federal tool with which to mount such a challenge.

At the same time, the record developed by the Senate Judiciary Committee underlined emphatically the issue of whether the enactment left to federal authorities whether to use the statute to challenge *Miranda*. Notably, the Attorney General wrote the Senate Judiciary Committee that an attempt simply to dispense with the safeguards of *Miranda* was unconstitutional.' In context, the Attorney General's position followed directly from the Solicitor General's position in this Court in the build-up to *Miranda*, and from the FBI's practices approved by the opinion in *Miranda*. Yet, the Attorney General's position had special meaning in gauging how serious Congress was about whether practical policy

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disruptive practice, title II limits Federal jurisdiction to review a State court's final decision as to voluntariness of a confession . . . ." S. Rep. No. 170, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2138. For a discussion of the 1968 Senate bill's initial court-stripping provisions and a comparison with similar efforts of the preceding decade, see Gerald Gunther, *Constitutional Law* 47 & n.11 (11th ed. 1985), and sources cited therein. For further background and analysis of Congressional consideration of such court-stripping tools, see Charles Tiefer, *The Flag-Burning Controversy of 1989-90: Congress' Valid Role in Constitutional Dialogue*, 29 Harv. J. on Legis. 357, 392-98 (1992).

[9] "A review of S. 674 [which provided what became Title II] indicates a conflict with the 1966 decision by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436. . . . If S.674 is intended to dispense with the procedural safeguards established by *Miranda* . . . . it would be in conflict with current constitutional requirements." Letter by the Attorney General to Senator John L. McClellan (June 19, 1967), in *Hearings on S. 300, S. 552, S. 580, S. 274, S. 275, S. 278, S. 798, S. 824, S. 916, S. 917, S. 992, S. 107, S. 1094, S. 1194, S. 1333, and S. 2050 Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. Of the Judiciary*, 90th Cong., 1st Sess. 81 (1967); *see* Note, *Recent Statute: Title II of the Omnibus Crime Control and Safe Streets Act of 1968*, 82 Harv. L. Rev. 1392, 1398 (1969).

considerations necessitated a challenge to *Miranda*. The Attorney General's position awakened both proponents and opponents of a challenge to *Miranda* that if they left what to do with the provision to the Attorney General, they were leaving the provision to someone who did not favor such a challenge.

This was not an obscure piece of legislative history, subject to the charge of being squirreled away in the dead of night by minor staffers working with special-interest lobbyists. The Attorney General told the Senate Judiciary Committee, at a moment when law-and-order issues very much had the Members' full attention, something they could fully appreciate for its significance in the legislative world. In plain English, the Attorney General was taking the political heat for not challenging *Miranda*. The Senate's center, polarized between those who wanted to enact a symbolically anti-*Miranda* provision, and those who sought not to challenge *Miranda*, could find a middle ground. Senators in the center could enact a provision to take up the Attorney General's offer, in effect, to take the heat, by enacting a provision which, while symbolically anti-*Miranda*, would leave the decision whether to mount a challenge to *Miranda* to the Attorney General who had so helpfully announced his adherence to *Miranda*.

Ultimately, after the Senate Judiciary Committee reported out the 1968 bill, it wrote an incendiary committee report supporting a challenge to *Miranda*. S. Rep. No. 170, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112. This has been taken by some as reflecting a clear Congressional intent to force such a challenge without regard to the view of the Executive Branch. The majority opinion of the Fourth Circuit so cited the report, quoting it repeatedly, and at length. 166 F.3d at 686. This is a superficial reading of the legislative history. The committee reported Title II on the weakest possible basis, a tie vote, not foreshadowing what would ultimately be the Congressional intent underlying the enactment, much less eager to see *Miranda* challenged. 114

Cong. Rec. 13990 (May 20, 1968)(Sen. Tydings)("title II . . . is presently retained in that measure as a result of a tie vote of 8 to 8 of the Senate Judiciary Committee").

Even looking just at Chairman Eastland's strategy in that report, he chose not to establish a promising foundation for any definite challenge. His report claimed that the committee had built up a record against *Miranda*, and left it at that.[10] Notably, the report did not seriously take up *Miranda*'s own invitation[11] to proffer equivalently effective alternative safeguards to supplant *Miranda*'s. Chairman Eastland's decision against the more promising approach of setting up alternatives to supplant *Miranda* cannot be explained away as that nothing could be proposed as an alternative to *Miranda* that would be easy for law enforcers to perform. Both at the time, and today, some proponents of alternatives to *Miranda* have urged that something as limited as videotaping confessions might be tried.[12]

Chairman Eastland's choice not to establish a more promising foundation for a challenge to *Miranda* reflects the particular legislative context. In Title III of the 1968 Act

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[10] "Passage of this bill with all of its legislative history . . . will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices." S. Rep. No. 170, *supra*, 1968 U.S.C.C.A.N. at 2133.

[11] "It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities . . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467; *accord id.* at 477, 479.

[12] By contrast, the other side in the debate over alternatives to *Miranda* has suggested that equivalent safeguards would involve more than "lightweight" alternatives, such as a combination of interposition of neutral and professional magistrate-like figures for interrogation as in the continental system, and restrictions, clarified and heightened, on what constitutes improper interrogation tactics.

itself,[13] and in another statute dealing with evidence, the Jencks Act,[14] the Congress had desired strongly an assured actual effect of addressing judicial restraints on FBI procedures, not just something largely symbolic. So, in those statutes, Congress had put forth a new system to respond to criticisms of unrestrained practices.[15] By contrast, in this context, since the FBI had long accepted *Miranda*-model procedures, federal law enforcers neither sought, nor did those in Congress have to seek for them, an assured actual effect of modifying judicial restraints. This allowed Chairman Eastland's committee to forego establishing an alternative

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[13] This Court had decided *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), regarding electronic eavesdropping. Title III of the 1968 Act itself, 82 Stat. 211, 18 U.S.C. sec. 2510 et seq., solved the problem of the requirements of the *Berger* and *Katz* cases by mandating the system for warrants for electronic eavesdropping. Title III did not just make a symbolic statement that the Court should go back to the law before *Berger* and *Katz*; it created a new system for law enforcers.

[14] The Jencks Act solved the problem of the requirements of production of prior statements by government witnesses imposed by this Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957). That act, codified as 18 U.S.C. sec. 3500, did not just make a symbolic statement that the Court should go back to the law before *Jencks*. It created a system which involved new practices, procedures and duties for the FBI. (In *Palermo v. United States*, 360 U.S. 343 (1959), this Court accepted Congress' modification of *Jencks*' standards. It should be noted that the Court's decision in *Jencks* was based on supervisory powers over federal cases. Hence, on that ground as well, the sequence of Congress enacting a statute in that instance in response to a Supreme Court decision is distinguishable from the enactment of section 3501.)

[15] The Congresses that enacted the Jencks Act, and Title III of the 1968 Act itself, had taken the route of putting forth codes of law enforcement procedures regarding, respectively, production of witnesses' prior statements, and electronic eavesdropping. In those enactments, Congress thereby assured, and obtained, an actual effect on law enforcement procedures, such as restoring to the FBI tools of accumulating different kinds of witness interview statements, and court-authorized wiretapping, that the FBI feared would be impaired or lost by Supreme Court decisions.

system with a definite probability of impressing the judiciary. Rather, he could pursue an approach, by not putting forth even limited alternative safeguards to *Miranda*'s, that produced no assured likelihood affecting *Miranda*, but achieved more political objectives. Namely, section 3501 would demonstrate to the public, in an election year, a concern for law and order and an opposition to the asserted excessive leanings of the Warren Court. This, however, only required that section 3501 go on the books, not that it force an actual court case challenging *Miranda*, and certainly not that it force one with serious prospects for successfully challenging *Miranda*.

More important, when Chairman Eastland's committee's reported bill came to the Senate floor, the Senate voted[16] to change the reported Title II, eliminating the provisions that would have allowed a challenge to *Miranda* to be mounted by state authorities even without a central role for federal authorities. In a major Senate debate, opponents of the reported Title II charged *Miranda*'s constitutional nature made Title II unconstitutional.[17] Reinforcing the testimony of the Attorney General, President Johnson wrote to Majority Leader Mansfield to inform the debating Senate. The President urged passage of the bill's gun control and grant provisions while recommending "not encumbering the legislation with provisions raising grave constitutional questions." President's Letter to the Majority Leader of the Senate Regarding the Crime Control and Safe Streets Bill, 4

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[16] The Senate's action on floor amendments often "signifie[s] the real division in the Senate," Charles Tiefer, Congressional Practice and Procedure 646 (1989), while the vote on final passage is "unanimous or lopsided, which serve[s] only symbolic purposes." *Id.*

[17] *See, e.g.*, 114 Cong. Rec. 11891 (May 6, 1968)(Sen. Tydings)("blatant attempt to amend the Constitution by a simple legislative enactment"); *id.* 14135 (May 21, 1989)(Sen. Fong)("Since section 3501 dispenses with these safeguards, the section is contrary to the present requirements of the Constitution."); *id.* 14184 (Sen. Brooke)("I do not think Miranda v. Arizona can be reversed by statute").

Pub. Papers 772, 773 (May 9, 1968), reprinted in 114 Cong. Rec. 12450 (May 9, 1968).[18]

Leading conservative Republican Senators, while voting to leave the largely symbolic section 3501 in the bill, vocally and bravely led the bipartisan effort that removed the provisions regarding state cases.[19] When the bill went back to the House, a similar debate occurred, with similar charges about unconstitutionality.[20] Moreover, proponents of Title II in the House took a route to adoption that prevented serious House consideration of section 3501, evidently expecting that such consideration would have led to the provision's elimination from the bill.[21]

Beyond what was said in the debate, what matters was the textual effect of what the Senate did. By eliminating the provisions that would have let state authorities challenge

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[18] *See Eric D. Miller*, Comment, *Should Courts Consider 18 USC Sec. 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029 (1998), at n.27.

[19] 114 Cong. Rec. 14180 (May 21, 1968)(Sen. Griffin)(quoting a law professor that "I regard Title II as fully as ominous an assault on the Supreme Court as the court-packing proposal of the 1930's").

[20] House Judiciary Committee Chairman Celler, who denounced Title II as unconstitutional, placed in the record a detailed analysis of the constitutional issue of Title II, with conclusions such as: "even though Congress has broad general power under the Constitution to enact procedural rules governing the admissibility of evidence in Federal Courts, nothing in the Constitution gives Congress the power to adopt procedural rules that overrule specific decisions of the Supreme Court interpreting the fundamental requirements of the Constitution." 114 Cong. Rec. 16067 (June 5, 1968).

[21] The bill did not go to conference because House procedures allowed House conservatives to get a straight up-or-down vote on the version of the bill as passed by the Senate. This maneuver was accurately described by both sides on the House floor as aimed at preventing House Judiciary Committee Chairman Celler from eliminating section 3501 in conference.

Miranda,[22] the amending Senators set up a situation where they had every reason to expect that it remained up to the federal Attorney General whether to mount a challenge to *Miranda* using the pared-down Title II. Again, the contemporaneous context underlines this point. The immediate Executive reaction mirrored the previously described extant FBI *Miranda*-model practices, Attorney General testimony, and Presidential communication. In rapid succession, President Johnson's signing statement for the Act in June 1968 announced that the FBI's practice of *Miranda*-model warnings would continue and that the statute would be "interpreted in harmony with the Constitution."[23] Then, the Attorney General instructed U.S. Attorneys to offer into evidence only confessions obtained in accordance with *Miranda*.[24]

Accordingly, the majority opinion of the Fourth Circuit panel took too simple a view of the legislative history of the 1968 Act. In that hard-fought enactment process, proponents and opponents of a challenge to *Miranda* ended up enacting a version of Title II shaped as a rough compromise, in light of the difference between the outgoing Administration that certainly did not intend to use Title II to mount a challenge to

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[22] The votes to take provisions out of Title II are at 114 Cong. Rec. 14181, 14184 (May 21, 1968).

[23] Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968 (June 19, 1968), in 4 Pub. Papers 981, 983 (June 19, 1968)("Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue.").

[24] Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions*, 63 Geo. L.J. 305, 311-12 (1974); Miller, *supra*, 65 U. Chi. L. Rev. at nn. 27-31.

Miranda and a potential incoming one that just might.[25] The compromise took the power to mount such a challenge away from state authorities who would surely have launched it, and left the provision only in the domain of federal authorities of contemporary and future administrations. It was a Senate outcome that resolved the heated constitutional and political debate between the two sides, not by altering or circumventing the federal law enforcement community's acceptance of *Miranda*, but by factoring in that acceptance by letting a statute emerge that was largely symbolic.

C. The History of Section 3501 Confirms Congress' Expectation That Section 3501 Would Serve Symbolic Purposes Rather Than Producing a Serious Challenge to *Miranda*.

For over thirty years, federal law enforcers have declined to mount the kind of challenge to *Miranda* that might have even a small likelihood of success. That history deserves judicial deference. It is not the history of a prosecutorial

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[25] During this shaping and enactment of the bill in May and June 1968, the Congressional Record reveals another aspect that further confirms the significance of section 3501's dependence on Attorney General invocation. With campaigning in full swing for the upcoming November 1968 election, the President's message signaled that election of a Democratic candidate would likely continue the current Administration's policies, including not challenging *Miranda*. On the other side, the Republican candidate, Richard M. Nixon, campaigned with an endorsement of Title II placed in the Congressional Record during the debate on Title II, signaling that upon his election, the next Administration might invoke legislation like section 3501 to challenge *Miranda*. Few matters regarding a provision could interest Senators more than a square contrast in campaign positions between the current Administration and the next. Richard M. Nixon, *Toward Freedom from Fear* (May 8, 1968), reprinted in 114 Cong. Rec. 12,937-38 (May 10, 1968)(statement by then-candidate Nixon to "urge Congress to enact proposed legislation that - dealing with . . . Miranda . . . - would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession"); Fred P. Graham, The Self-Inflicted Wound 305-32 (1970); Mark E. Herrmann, Note, *Looking Down from the Hill*, 33 Wm. & Mary L. Rev. 543, 576-86 (1992).

quest to cut back civil liberties which might lead judges carefully to consider recognizing fully those liberties. Rather, it is a history of prosecutorial self-restraint, transcending political party and ideological orientation, in recognition of the special nature of *Miranda*. That represents a sound balance between effective law enforcement and the constitutional rights of all Americans worthy of judicial deference.

As previously noted, immediately following enactment, the Johnson Administration interpreted section 3501 as leaving Executive Branch discretion to preserve existing FBI *Miranda*-model practices, and as allowing the Attorney General to decide whether to invoke the section, which he decided against doing. In the Nixon Administration that began the following year, Attorney General Mitchell made symbolic statements that section 3501 could be invoked in some very limited circumstances,[26] and there were ensuing cases.[27] But, as a practical matter, the Nixon Administration did not attempt to change custodial interrogation practices, did not attempt to employ section 3501 in a way that would likely produce a test in this Court of *Miranda*, and left section 3501 largely uninvoked.[28] There was no authoritative explanation of this. It is fair to surmise that the Nixon Administration considered Title II as a symbolic issue in the

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[26] *See* United States Department of Justice, Memorandum: Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (June 11, 1969), reprinted in 115 Cong Rec. 23236-38 (Aug. 19, 1969).

[27] Examples include *United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975)(on the one hand, "the trial court did not err in applying the guidelines of sec. 3501"; on the other hand, there was also "full compliance with the Miranda mandates"); *United States v. Vigo*, 487 F.2d 95, 299 (2d Cir. 1973)(declining to determine section 3501's constitutionality).

[28] Miller, *supra*, at note 32; Laurie Magid, Essay, *The Miranda Debate: Questions Past, Present, and Future*, 36 Hous. L. Rev. 1251, 1275 (1999).

1968 campaign, but once in office, it did not find Title II necessary for the serious task of effective law enforcement. Moreover, *Miranda*'s rapid acceptance even by local law enforcement authorities took away any reason that an Attorney General might see for mounting an actual challenge to *Miranda*.

In any event, the pattern established by the Johnson and Nixon Administrations continued in later administrations.[29] In 1986, the Office of Legal Policy published a report to Attorney General Meese with seemingly significant statements about *Miranda* and section 3501.[30] However, the Justice Department largely continued its prior pattern, which did not lead to any cases in this Court using section 3501 to challenge *Miranda*.[31] The 1990s has been the occasion of renewed debate, and some judicial activity (such as the Fourth Circuit's decision), but no change in the Executive Branch's consistent approach of not mounting a major challenge to *Miranda* in this Court using section 3501.[32]

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[29] "Later administrations have not strayed from Nixon's lead in following Miranda rather than section 3501 . . . ." Herrmann, *supra*, at 583.

[30] Office of Legal Policy of the Department of Justice, Report to the Attorney General on the Law of Pre-Trial Interrogation (1986), reprinted in 22 U. Mich. J.L. Reform 437 (1989).

[31] Magid, *supra*, at 1276; Miller, supra, at n. 35 ("However, the [Reagan] Administration does not appear to have succeeded in obtaining any court rulings on Section 3501.").

[32] Testimony at a Senate hearing last May included a discussion by a former federal prosecutor of why the Justice Department of the past decade could properly, and did, decide to not invoke section 3501. Testimony of Associate Professor Daniel C. Richman, *Voluntary Confessions Law: Hearings of the Subcomm. On Administrative Oversight and the Courts of the Sen. Comm. On the Judiciary*, 106th Cong., 1st Sess. (May 13, 1999), reprinted in 1999 WL 311272 (F.D.C.H.). This provides a useful account from the 1990s perspective.

While there are those who label the Executive pattern as a failure to faithfully execute the laws, Congress has not reacted that way. Section 3501 is a provision that sits on the books as a largely symbolic statement. When seven Administrations over 30 years have not mounted a challenge to *Miranda*, such a continuing consistent judgment is responsible and should be given weight.

III. If Section 3501 is Interpreted to Require This Court to Deem *Miranda* Superseded In This Case, The Provision Is Unconstitutional As So Interpreted

House Democratic amicus will not duplicate the full treatments by the United States, and by other amici, of the conflict between section 3501 and the constitutional rights involved in *Miranda*. Amicus agrees with the United States that *Miranda*'s constitutional roots, strengthened by its long history of success in law enforcement operation as well as by this Court's fidelity to *stare decisis*, put *Miranda* beyond being superseded by section 3501, particularly since the provision proposes no alternative set of safeguards. While the United States has not sought independent review of the unusual path by which section 3501 reached this Court, that path underlines the special constitutional problems with deeming *Miranda* superseded by section 3501 as applied in this case. The sequence in this case - notably that federal authorities believed they had complied with, and sought to comply with, *Miranda* and did not raise section 3501 in the Court of Appeals - underlines the symbolic aspects of an application of the provision in this case. This is made evident by drawing on the foregoing review of the positions of Congress and the Executive Branch before and after enactment.

First, the decision in the past 30 years not to mount a challenge to *Miranda* based on section 3501 has resulted from the exercise by a succession of Attorneys General of what has proven to be sound judgment. When Congress enacted section 3501, Congress expected, as described above, that

while the current (Johnson) Administration would not mount a challenge to *Miranda*, the next Administration just might decide to do so. If that had occurred, or if any of the six successor Administrations had decided to do so, at least the exercise of that Administration's judgment would presumably represent the fulfillment of Congress' expectations as to the existence of a basis to mount a challenge to *Miranda*. No such exercise of judgment by the Executive Branch has occurred. Moreover, the use of section 3501 in this case has proceeded without the support of the insulated, nonpolitical prosecutorial personnel, such as the Justice Department and FBI career levels, who for thirty years have followed *Miranda* without recommending the mounting of a challenge.

Second, the application of section 3501 to this case, in which federal law enforcement authorities did not decide in favor of mounting a challenge to *Miranda*, weighs Congressional power against a constitutional decision of this Court, without Congress having found, ether certainly or contingently, a problem calling for necessarily overruling that decision. The record created by the Senate Judiciary Committee, and described in its report, overwhelmingly concerned whether *Miranda* interfered with local law enforcement. The Senate committee intended this to support Title II as reported, which cut off federal review of state cases, while section 3501, which the Senate left in when it eliminated other provisions, concerns only federal law enforcement. Section 3501 made it to passage, not because of any problem in federal law enforcement, but for quite the opposite reason. Existing FBI practices, which there was no reason to change, meant there was no serious problem with *Miranda* in federal law enforcement; so, legislating largely symbolically only for federal cases became the middle ground between Senators who wanted a symbolic statement against *Miranda* and those who wanted no definite mounting of a challenge to *Miranda*. Therefore, Congress did not definitively decide in 1968 it was facing a problem with *Miranda* as it applied to federal law enforcement that necessitated a challenge to *Miranda*. Moreover, to the extent

that some in Congress might hope, contingently, that if the Executive Branch decided to mount such a challenge, *Miranda* might be superseded, even that contingency has not occurred. Whatever Congress' power to force a challenge to *Miranda* when it decides this is necessary to solve a problem, the situation is different when Congress has neither certainly, nor even contingently, found that such a problem exists.

In sum, the application of section 3501 in this case challenges *Miranda* without either the legislative or the executive branch making the determination that there is a definite need to do so. If the Court must reach the issue of section 3501's constitutionality, a statutory application so at odds with the proper working of our constitutional system should not be upheld. Whereas in *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997), the United States could argue that an extensive legislative record showed the challenged act dealt with national problems - in a word, that both the legislative and executive branches supported the act - the strained application of section 3501 is one which neither the enacting Congress, nor the Executive Branch, considers as dealing with such problems. That makes a much weaker case than was presented, without success, in *City of Boerne* - too weak a case for the statutory application to be upheld as constitutional.

It may be asked why a Congressional amicus would ever urge this conclusion. The answer is that Congressional amici have often argued against indefensible statutory applications, and this Court has found merit in those arguments. *See, e.g.*, *AFSA v. Garfinkel*, *supra*. Using section 3501 in this case to declare *Miranda* superseded does not represent a balance between effective law enforcement and the constitutional rights of all Americans of the kind a conscientious Congress seeks to enact. House Democratic amicus opposes it, and this Court should not adopt it.

CONCLUSION

Congress enacted Section 3501 with little or no basis for a challenge to *Miranda*, particularly absent a decision by federal law enforcement authorities to mount such a challenge. The process of section 3501's enactment, and the consistent decision against mounting such a challenge by the Johnson, Nixon, Ford, Carter, Reagan, Bush, and Clinton Administrations, show that the Fourth Circuit erred. *Miranda* should easily survive this case.

Respectfully submitted

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